Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-82–11 OF 2015(W)
ZULKEFLI CJ (MALAYA), SURIYADI, ABU SAMAH NORDIN, RAMLY ALI AND AZIAH ALI FFCJ
2 AUGUST 2016

Civil Procedure — Appeal — Cross-appeal — Plaintiff raised preliminary objection against first defendant's cross-appeal — Whether first defendant's cross-appeal sought to raise matters unconnected with plaintiff's appeal — Whether cross-appeal should have been restricted to vary part of order that was being appealed by plaintiff — Whether notice of cross-appeal could only raise contentions to vary decision of High Court — Whether first defendant should have filed separate notice of appeal if it wanted High Court decision to be reversed or set aside

Leisure Farm Corp ('the plaintiff') had entered into an agreement for the purchase of Golf Course land ('the land') owned by Resort Pore-Sia Bhd ('the second defendant'). Kabushiki Kaisha Ngu ('the first defendant'), which owned all the shares in the second defendant, had negotiated with the plaintiff for the sale of the land. The plaintiff had entered private caveats to protect its interest over the land. However, the defendants entered into a subsequent agreement with Walker Asia Development Sdn Bhd ('the third defendant') to sell a part of the land to the third defendant. The plaintiff filed an action against the defendants wherein it prayed, inter alia, for an order of specific performance of the agreement it had entered into with the first and second defendants. The High Court found that there was a valid and bind contract between the plaintiff and the first and second defendants for the sale and purchase of the land and that the third defendant was not a bona fide purchaser for value without notice, as he was aware of the agreement between the plaintiff and the first and second defendants. However, the High Court granted the plaintiff an order for damages in lieu of specific performance. The plaintiff appealed to the Court of Appeal against that part of the judgment of the High Court that granted it damages in lieu of specific performance. It was the plaintiff's contention that it was entitled to an order of specific performance in this case. The first defendant also filed a cross-appeal by which it intended to reverse the entire decision of the High Court. Before the Court of Appeal, the plaintiff raised a preliminary objection against the first defendant's appeal. The plaintiff argued that the effect sought by way of the first defendant's cross-appeal was to set aside the finding of the High Court that there was a concluded contract. It was thus the plaintiff's contention that the first defendant sought to raise matters which were unconnected with its appeal,

which was only against a part of the judgment ie that no specific performance had been ordered. As such, it was the plaintiff's case that the first defendant's appeal should have been filed and heard separately and not as was done here filed as a cross-appeal. The Court of Appeal agreed with the plaintiff and ruled that the cross-appeal should have been restricted to vary that part of the order that was being appealed by the plaintiff and should not be permitted to seek to reverse any other aspects of the decision of the High Court. The first defendant has now obtained leave to proceed with the present appeal. It was the first defendant's contention that the Court of Appeal had taken too narrow a view of the efficacy of the cross-appeal and that the Rules of the Court of Appeal 1994 ('the RCA') did not stipulate any restriction as to the subject matter of complaint that could be brought by way of cross-appeal so long as it related to the decision under appeal.

Held, dismissing the appeal with costs:

(1) In construing r 8 and Form 2 of the RCA, the Court of Appeal had rightly held that the word 'vary' by itself should be given its ordinary and natural meaning to mean change, make, different, modify'. The Court of Appeal was also right in holding that r 5 of the RCA provided for an appeal to be lodged against the whole or part of any judgment or order of court and that such an appeal in contrast to a cross-appeal was by way of a rehearing. Hence if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal. Since the High Court found that a valid and binding agreement had been concluded between the plaintiff and the first defendant and since such a finding was adverse against the first defendant, it would follow that the first defendant should have filed a separate notice of appeal if it wanted the High Court decision to be reversed or set aside. Under s 67(1) of the Courts of Judicature Act 1964 ('the CJA') the first defendant, as a litigant, had the right of appeal to appeal against 'any judgment or order of any High Court'. It was also trite that such an appeal should be filed pursuant to r 5 of the RCA. However, given the fact that the first defendant had not filed a separate notice of appeal, the plaintiff had rightly raised a preliminary objection against the first defendant's cross-appeal, which was recast as an appeal in itself to set aside the judgment of the High Court (see paras 15–16 & 19–21).

(2) The first defendant ought to have filed an independent notice of appeal as a notice of cross-appeal did not provide for a complaint to be reheard. Under r 8 of the RCA the first defendant could not set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant could only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA as only an appeal by way of a notice of appeal constituted a rehearing. The operative words of 'to contend' and 'decision of the High

Court should be varied' in r 8 of the RCA clearly limited the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It was incumbent on the first defendant to independently file a notice of appeal under r 5 of the RCA to rehear the issues that were not decided in the first defendant's favour as a notice of cross-appeal did not provide for a complaint to be re-heard (see paras 23 & 36).

(3) The case of *Sumarni v Yow Bing Kwong & Anor* ('*Sumarni*'s case'), which was relied upon by the first defendant to support its case, could be distinguished on its facts from the present case. Moreover, the point argued in the present appeal was not canvassed before the court in *Sumarni*'s case. In the present case the Court of Appeal had rightly applied the principle that an appeal on a point which did not affect the original appellant should not be by a cross-appeal. In other words, where the respondent wished to raise matters which were unconnected with the substance of the appeal by the appellant the respondent should proceed by way of a separate notice of appeal (see paras 29 & 31).

[Bahasa Malaysia summary

Leisure Farm Corporation ('plaintif') telah memasuki perjanjian untuk membeli tanah padang golf ('tanah tersebut') yang dimilik oleh Resort Pore-Sia Bhd ('defendan kedua'). Kabushiki Kaisha Ngu ('defendan pertama'), yang memiliki semua saham dalam defendan kedua, telah berunding dengan plaintif untuk jualan tanah tersebut. Plaintif telah memasuki kaveat persendirian bagi melindungi kepentingannya ke atas tanah tersebut. Walau bagaimanapun, defendan-defendan telah memasuki perjanjian berikutnya dengan Walker Asia Development Sdn Bhd ('defendan ketiga') untuk menjual sebahagian tanah tersebut kepada defendan ketiga. Plaintif telah memfailkan tindakan terhadap defendan-defendan di mana ia memohon, antara lain, untuk satu perintah pelaksanaan spesifik untuk perjanjian tersebut yang telah dimasukinya dengan defendan-defendan pertama dan kedua. Mahkamah Tinggi mendapati bahawa terdapat kontrak yang sah dan mengikat antara plaintif dan defendan-defendan pertama dan kedua untuk jual dan beli tanah tersebut dan bahawa defendan ketiga bukan pembeli bona fide untuk nilai tanpa notis, kerana dia mengetahui tentang perjanjian antara plaintif dan defendan-defendan pertama dan kedua. Namun begitu, Mahkamah Tinggi telah memberikan plaintif perintah untuk ganti rugi menggantikan pelaksanaan spesifik. Plaintif merayu kepada Mahkamah Rayuan terhadap bahagian penghakiman Mahkamah Tinggi tersebut yang memberikannya ganti rugi menggantikan pelaksanaan spesifik. Ia adalah hujah plaintif bahawa ia berhak kepada perintah pelaksanaan spesifik dalam kes ini. Defendan pertama juga telah memfailkan rayuan balas di mana ia berhasrat untuk mengakas keseluruhan keputusan Mahkamah Tinggi. Di hadapan Mahkamah Rayuan, plaintif telah menimbulkan bantahan awal terhadap rayuan defendan

pertama. Plaintif berhujah bahawa kesan yang dipohon melalui rayuan balas defendan pertama adalah untuk mengetepikan penemuan Mahkamah Tinggi bahawa terdapat kontrak yang disimpulkan. Oleh itu ia adalah hujah plaintif bahawa defendan pertama memohon untuk menimbulkan perkara-perkara yang tiada kaitan dengan rayuannya, yang hanya terhadap sebahagian daripada penghakiman iaitu bahawa tiada pelaksanaan spesifik telah diperintahkan. Oleh itu, ia adalah kes plaintif bahawa rayuan defendan pertama hendaklah difailkan dan didengar secara berasingan dan tidak seperti yang difailkan di sini sebagai satu rayuan balas. Mahkamah Rayuan bersetuju dengan plaintif dan memutuskan bahawa rayuan balas itu tidak patut dihalang untuk mengubah bahagian perintah tersebut yang dirayu oleh plaintif dan tidak patut dibenarkan memohon untuk mengakas apa-apa aspek lain keputusan Mahkamah Tinggi itu. Defendan pertama kini telah memperoleh kebenaran untuk meneruskan dengan rayuan ini. Ia adalah hujah defendan pertama bahawa Mahkamah Rayuan telah mengambil pendapat yang sempit berhubung keberkesanan rayuan balas dan bahawa Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') tidak menetapkan apa-apa sekatan berhubung hal perkara aduan yang boleh dimulakan melalui rayuan balas selagi ia berkaitan keputusan di bawah rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam mentafsir k 8 dan Borang 2 KMR, Mahkamah Rayuan telah betul dalam memutuskan bahawa perkataan 'vary' dengan sendiri sepatutnya memberikan maksud semula jadi dan biasa untuk bermaksud 'change, make, different, modify'. Mahkamah Rayuan juga betul dalam memutuskan bahawa k 5 KMR memperuntukkan satu rayuan dibuat terhadap keseluruhan atau sebahagian mana-mana penghakiman atau perintah mahkamah dan bahawa rayuan sedemikian berbanding kepada rayuan balas adalah melalui perbicaraan semula. Justeru jika ia adalah penemuan substantif mahkamah yang diniatkan untuk diserang, ia terletak atas pihak terkilan untuk memfailkan notis rayuan sewajarnya. Oleh kerana Mahkamah Tinggi mendapati bahawa perjanjian yan sah dan mengikat telah disimpulkan antara plaintif dan defendan pertama dan oleh kerana penemuan sedemikian adalah bertentangan terhadap defendan pertama, ia diikuti bahawa defendan pertama patut memfailkan notis rayuan berasingan jika ia menginginkan keputusan Mahkamah Tinggi diakas atau diketepikan. Di bawah s 67(1) Akta Mahkamah Kehakiman 1964 ('AMK') defendan pertama, sebagai litigan, mempunyai hak rayuan untuk merayu terhadap 'any judgment or order of any High Court'. Ia juga lapuk bahawa rayuan sedemikian patut difailkan menurut k 5 KMR. Walau bagaimanapun, berdasarkan fakta bahawa defendan pertama tidak memfailkan notis rayuan berasingan, plaintif dengan wajar telah menimbulkan bantahan awal terhadap rayuan balas defendan pertama, yang dianggap sebagai rayuan dengan

sendirinya untuk mengetepikan penghakiman Mahkamah Tinggi (lihat perenggan 15–16 & 19–21).

(2) Defendan pertama sepatutnya telah memfailkan notis rayuan berasingan kerana notis rayuan balas tidak mewajarkan aduan didengar semula. Di bawah k 8 KMR defendan pertama tidak boleh mengetepikan penemuan fakta yang substantif dibuat oleh Mahkamah Tinggi melalui notis rayuan balas. Defendan pertama hanya boleh mengetepikan penemuan substantif Mahkamah Tinggi melalui notis rayuan di bawah k 5 KMR kerana hanya rayuan melalui notis rayuan merupakan perbicaraan semula. Perkataan-perkataan operatif 'to contend' dan 'decision of the High Court should be varied' dalam k 8 KMR jelas mengehadkan hujah di bawah notis rayuan balas untuk mengubah dengan berkesan keputusan, bukan mengetepikan penghakiman atau perintah. Ia wajib ke atas defendan pertama untuk secara berasingan memfailkan notis rayuan di bawah k 5 KMR untuk mendengar semula isu-isu yang tidak diputuskan menyebelahi defendan pertama kerana notis rayuan balas tidak mewajarkan aduan untuk didengar semula (lihat perenggan 23 & 36).

(3) Kes *Sumarni v Yow Bing Kwang & Anor* ('kes *Sumarni*'), yang digunakan oleh defendan pertama untuk menyokong kesnya, boleh dibezakan berdasarkan faktanya daripada kes ini. Tambahan pula, perkara yang dihujahkan dalam rayuan ini tidak dibentang di hadapan mahkamah dalam kes *Sumarni*. Dalam kes ini Mahkamah Rayuan dengan wajar telah mengguna pakai prinsip bahawa rayuan berhubung perkara yang tidak menjejaskan perayu asal tidak patut dibuat secara rayuan balas. Dalam erti kata lain, di mana responden berhasrat untuk menimbulkan perkara-perkara yang tiada kaitan dengan perkara penting rayuan oleh perayu responden hendaklah memulakan melalui notis rayuan yang berasingan (lihat perenggan 29 & 31).]

Notes

For cases on cross-appeal, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1098–1099.

Cases referred to

Alati v Kruger (1955) 94 CLR 216, HC (refd)
Cavander's Trusts, Re (1881) 16 Ch D 270, CA (refd)
In re Parker (Deceased) Crow v Weston [1948] NZLR 9, CA (refd)
Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367, CA (refd)
Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608; [2008] 3 CLJ 489, CA (distd)
Vadlamudi Venkateswarlu and anor v Ravipati Ramamma and anor AIR 1950 Mad 379, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 67(1)
Rules of Court 2012 O 55 r 8
Rules of the High Court 1980 O 55 r 3
Rules of the Court of Appeal 1994 rr 5, 5(2), (4), 7, 8, 8(1), 9, 10, 17, Forms 1, 2, Part I, Part II

Cyrus Das (Ong Chee Kwan with him) (Christopher & Lee Ong) for the appellant.
Cecil WM Abraham (Rishwanti Singh and Esther Yee with him) (Cecil Abraham & Partners) for the first respondent.
Ang Hean Leng (Lee Hishammuddin Allen & Gledhill) for the second respondent.
Malik Imtiaz Sarwar (Mathew Thomas Philip, Tan Jee Tjun and Aaron Chelliah with him) (Thomas Philip) for the third respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] The appellant was the first defendant and the first respondent was the plaintiff before the High Court. Also before the High Court the second respondent was the second defendant and the third respondent was the third defendant. We shall refer to the parties as they were before the High Court.

[2] This is an appeal by the first defendant arising from the Court of Appeal's ruling in allowing the plaintiff's preliminary objection that the first defendant's notice of cross-appeal dated 15 April 2014 ('notice of cross-appeal') should be restricted to vary that part of the order that was being appealed by the plaintiff and not be permitted to seek to reverse any other aspects of the decision of the High Court. The plaintiff's appeal was only against part of the judgment of the High Court on 11 March 2014 in granting damages in lieu of specific performance despite holding that the plaintiff had proven its case that there was a valid and binding contract entered into with the first defendant for the sale and purchase of the golf course land and the memberships therein. The Court of Appeal also noted that if the first defendant intends to reverse the entire decision of the High Court, then the first defendant ought to have filed a notice of appeal against the order of the High Court within the time limited to file an appeal.

[3] Before the Court of Appeal the plaintiff as the appellant had sought for an order to reverse the order for damages granted in lieu of specific performance by the High Court and to obtain an order for specific performance of the agreement reflected in the Hong Kong Memorandum dated 16 March 2012 ('the HK MOU') for the purchase of the golf course land.

[4] It is the plaintiff's contention that the order of specific performance ought to be granted in light of the fact that the High Court had rightly found that the HK MOU constituted a valid and binding contract between the plaintiff and the first defendant for the sale and purchase of the golf course land and the memberships therein.

[5] The Federal Court on 8 October 2015 granted leave to the first defendant to appeal on the following questions of law:

(a) whether a notice of cross-appeal under Rules of the Court of Appeal 1994 ('the RCA 1994') is to be limited in the issues or the scope of issues it may raise?

(b) whether a respondent can be precluded from raising an issue by notice of cross-appeal on the ground that it was open to him to independently appeal on the issue? and

(c) whether it was opened to the respondent to appeal over an issue which did not form part of the order made by the High Court but comprised one of the reasons for its decision in favour of the appellant?

[6] It is noted that the second and the third defendants made no submissions and were not heard in the course of submissions in the Court of Appeal. We took it that they were not affected by the objection taken by the plaintiff as to the scope of the notice of cross-appeal filed by the first defendant. As there is no appeal or cross-appeal before the Court of Appeal and having chosen not to be heard, the second and the third defendants should, therefore, not be heard here in the Federal Court.

BACKGROUND FACTS

[7] The relevant background facts of the case are these. In 2011 and leading up to 16 March 2012, Sugiki, the president of the first defendant, negotiated on behalf of the first and second defendants for the sale of property known as the golf course land to the plaintiff. The first defendant owns all the shares in the second defendant. The second defendant owns the golf course, including the golf course land.

[8] On 31 May 2012 and 4 June 2012 the plaintiff entered private caveats over the golf course land ('the private caveats'). On 11 July 2012 the plaintiff filed a suit in the High Court against the first defendant for specific performance of the sale and purchase agreement pertaining to the sale and purchase of the entire issued shares in the second defendant. On 25 July 2012 the second defendant granted the third defendant an option to purchase part of the golf course land. On 11 September 2012 the first and third defendants entered into a sale and purchase agreement ('the walker SPA') to purchase part

of the golf course land. A 10% deposit was paid. On 19 September 2012 the plaintiff obtained before the High Court an injunction restraining the first and second defendants from dealing with the golf course land. An inter partes injunction was granted on 7 November 2012. On 11 January 2013 the third defendant intervened in the High Court suit and filed a counterclaim seeking a declaration that the plaintiff has no caveatable interest over the golf course land.

FINDINGS OF THE HIGH COURT

[9] The High Court, inter alia, found that:

(a) there was a sale and purchase agreement between the plaintiff and the first defendant and the golf course land was the subject of the agreement;

(b) the second and third defendants were aware of the sale and purchase agreement of the first defendant and the plaintiff. The third defendant was therefore not a bona fide purchaser for value without notice;

(c) the first defendant owned all the shares in the second defendant. The first defendant agreed to sell all its shares in the second defendant to the plaintiff;

(d) the sole asset of the second defendant was the golf course land. The golf course land affected the pricing of the shares;

(e) the intention of the parties' right from the outset of the sale transaction was the purchase of the golf course land; and

(f) the third defendant was aware of the plaintiff's interest in the golf course land by virtue of the entry of the caveats. This was also stated in the third defendant's walker SPA.

DECISION OF THE COURT OF APPEAL

[10] In respect of the plaintiff's preliminary objection against the first defendant's notice of cross-appeal, the Court of Appeal amongst others held that:

(a) the operative words in r 8 of the RCA 1994 and Form 2 are 'should be varied ... specifying the grounds thereof' and 'to be varied to the extent' do not carry with them a meaning that there could be a total or wholesale setting aside or review of the substantive judgment or any findings of the court by way of a re-hearing under r 5 of the RCA 1994;

(b) the extent of any contention under a cross-appeal is to be limited to a modification or some slight difference to be made to that part only of the judgment appealed against. This is borne out by the terminology used — '... varied to the extent ...' clearly pointing to a limitation of sorts in

the scope of the matters to be advanced by way of the cross-appeal, that is, those words being given an ordinary and natural reading;

(c) this is consistent with the scheme of things envisaged under r 5 of the RCA 1994 which provides for an appeal to be lodged against the whole or part of any judgment or order of court and such an appeal (in contrast to a cross-appeal) is by a re-hearing. The word 're-hearing' used here clearly anticipates a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence if it is the substantive finding of the court that is intended to be attacked, it behoves upon the party aggrieved to file a proper notice of appeal;

(d) the plaintiff being satisfied as to the finding of fact that there was a binding contract but dissatisfied that no specific performance had been ordered was appealing only against a part of the judgment, namely that the court ought to have in all the circumstances allowed the relief of an order of specific performance of the contract rather than that damages in lieu thereof be recovered from the first defendant. Given that was the scope of the appeal itself, any cross-appeal by the first defendant that could be pursued was necessarily limited, as to the dissatisfaction with the damages in lieu (to be assessed), the further damages in the sum of RM841,691.94 and costs of RM150,000 ordered against the defendant; and

(e) the effect sought by way of the first defendant's cross-appeal was to set aside the finding of court that there was a 'concluded contract'. This could only be pursued by the first defendant by filing a proper and separate notice of appeal within the one month allowed for an appeal to be lodged. Accordingly, the first defendant was precluded in the course of advancing their cross-appeal from raising any argument that there was no valid and concluded contract as held by the judge.

DECISION OF THIS COURT

[11] The issues raised in this appeal involve the interpretation and application of the provisions under rr 5, 7, 8, 9 and 10 of the RCA 1994. It is the first defendant's contention that the Court of Appeal had taken too narrow a view of the efficacy of the cross-appeal. The purpose of the cross-appeal is to have all complaints over the judgment under appeal to be heard together as a time and cost-saving exercise. It is also to ensure that all matters relating to the judgment are disposed of by the same appeal court.

[12] It is also the submission of the first defendant that the interpretation of the above mentioned rules of the RCA 1994 would themselves demonstrate that a cross-appeal stands on its own as an independent appeal. The Rules do

not stipulate any restriction as to the subject matter of complaint that may be brought by way of cross-appeal so long as it relates to the decision under appeal.

[13] At the outset it would be appropriate that we reproduce in full the provisions of rr 5 and 8 of the RCA 1994 to show the distinction between a notice of appeal and a notice of cross-appeal. These are as follows:

> PART I
>
> Appeals
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> 5 Appeal to be by re-hearing on notice
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> (1) Appeals to the Court shall be by way of re-hearing and shall be brought by giving notice of appeal.
>
> (2) Security for costs shall be given as provided in rule 17.
>
> (3) A notice of appeal shall substantially be in Form 1 in the First Schedule.
>
> (4) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only and what part, of the judgment or order is complained of.
>
> PART II
>
> Notice and Memorandum of Appeal
>
> 8 Notice of cross-appeal.
>
> (1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the High Court should be varied, he may, at any time after entry of the appeal and not more than ten days after the service on him of the record of appeal, give notice of cross-appeal specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file within the like period a copy of such notice, accompanied by copies thereof for the use of each of the Judges of the Court.
>
> (2) Notice of cross-appeal shall be substantially in Form 2 in the First Schedule.
>
> (3) If the respondent fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the Court, to contend on the hearing of the appeal that the decision of the High Court should be varied; but the Court may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.

[14] As regards the first question posed before this court as to whether a notice of cross-appeal may only raise contentions to vary the decision of the High Court, we are of the view that r 8 and Form 2 of the RCA 1994 are relevant consideration.

[15] In construing r 8 and Form 2 of the RCA 1994, the Court of Appeal had rightly considered the critical words used, namely 'should be varied ... specifying the grounds thereof' and 'to be varied to the extent'. Following this, the Court of Appeal had rightly held that the word 'vary' by itself should be given its ordinary and natural meaning as stated in *The Concise Oxford Dictionary* to mean 'change, make different, modify'.

[16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r 5 of the RCA 1994, and holding that r 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. The word 're-hearing' used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.

[17] We noted that the Court of Appeal's decision on the issues raised in the present appeal has been recently followed by another panel of the Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367 wherein Abdul Rahman Sebli JCA had this to say:

> [81] In the appeal before us, the High Court's refusal to grant prayers (a) and (b) of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside and not by filing a cross-appeal as was done in this case.

[18] It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie if the first defendant wanted the aforesaid decision to be reversed or set aside.

[19] Useful reference can also be made to the provision of s 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') which provides as follows:

> 67 Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[20] We are of the view that s 67(1) of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against 'any judgment or order of any High Court'. It is therefore trite that such an appeal must be filed pursuant to r 5 of the RCA 1994. A

[21] It is not disputed that the first defendant is entitled to have a 're-hearing' of the case before the Court of Appeal by way of a notice of appeal. It is our judgment, given the fact that the first defendant had not filed a separate notice of appeal, the plaintiff therefore had rightly raised a preliminary objection against the first defendant's cross-appeal which is recast as an appeal in itself to set aside the judgment of the High Court. B C

[22] On the second and third questions posed before this court we take the view that the first defendant ought to have filed an independent notice of appeal as a notice of cross-appeal does not provide for a complaint to be re-heard. D

[23] We are of the view that under r 8 of the RCA 1994 the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r 5 of the RCA 1994. Only an appeal by way of a notice of appeal constitutes a re-hearing. Rule 8 of the RCA 1994 does not state that a notice of cross-appeal '... shall be by way of re-hearing'. Rule 8 of the RCA 1994 only provides that a respondent could only contend that the decision of the High Court should be varied if the respondent files the notice of cross-appeal within ten days after the service of the record of appeal. E F

[24] We also noted by way of comparison that the RCA 1994 clearly provides that a notice of appeal under PART I Chapter Two on Civil Appeal is distinct and distinguishable from a notice of cross-appeal under PART II of the same Chapter Two of the RCA 1994. G

[25] Under r 5(2) of the RCA 1994 an appellant is required to lodge a deposit of RM1,000 pursuant to r 17 of the RCA 1994 for the purpose of filing of the notice of appeal. Under r 8 of the RCA 1994 it does not require the respondent to lodge any deposit for the filing of the notice of cross-appeal. H

[26] The notice of appeal filed by the appellant shall comply with Form 1, which contains the words 'being dissatisfied with the decision(s)' of the judge. On the other hand the notice of cross-appeal shall comply with Form 2, which contains the words of 'will contend that the decision(s)' of the judge 'ought to be varied to the extent and on the grounds hereinafter set out'. I

[27] Under Form 1 and r 5(4) of the RCA 1994, it further require that the appellant should specify as to whether the appellant is appealing against (a) the whole of the decision or order, or (b) such part only of the decision or order whilst under Form 2 and r 8 of the RCA 1994 the respondent is merely required to set out: (i) the nature of the relief claimed; and (ii) the grounds relied upon; for the purpose of varying the decision of the judge.

[28] Learned counsel for the first defendant submitted that the approach taken by the Court of Appeal in *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608; [2008] 3 CLJ 489 states the law on cross-appeals correctly and should be preferred rather than the narrow and rigid approach taken by the Court of Appeal in the present case.

[29] In *Sumarni*, when construing O 53 r 3 of the RHC 1980 (now preserved under O 55 r 8 of the Rules of Court 2012) which provision is in pari materia with r 8 of the RCA 1994, Abdul Hamid Embong JCA (as he then was) observed:

> As for the preliminary objection raised by the defendants that this appeal by the plaintiff should have been filed and heard separately, and not as was done here, filed as a cross-appeal and heard simultaneously with the defendants' appeal on liability, I find no flaw arising from the action taken by the plaintiff to file a cross-appeal. As was explained by learned counsel for the plaintiff, the defendants had earlier filed an appeal against the finding of liability by the learned sessions judge, even before the plaintiff could file her appeal on the quantum awarded. Under that situation the plaintiff may rightly act under O 55 r 3 of the Rules of High Court 1980 and file a cross-appeal within seven days, which was duly done. *In essence a cross-appeal although tagged to the defendants' initial appeal operate as an independent appeal and the appellate court may rehear both appeals together. In fact to file a cross-appeal under O 55 r 3 of the Rules of High Court 1980 as was done by the plaintiff here was quite regular and ultimately be a time and cost saving exercise. The objection taken by the defendants on this matter is thus without merit and should be dismissed.* (Emphasis added.)

[30] With respect we find the decision in *Sumarni* may be distinguished on the facts with the present case. The notice of cross-appeal addressed in *Sumarni* originated from the subordinate court to the High Court. The decision in *Sumarni* pertains to the interpretation of O 53 r 3 of the RHC 1980. There is no equivalent provision in the RHC 1980 of rr 5, 7, 8 and 10 of the RCA 1994. Moreover the point argued in the present appeal was not canvassed before the court in *Sumarni*.

[31] The Court of Appeal in the present case had rightly applied the principle enunciated in the English case of *Re Cavander's Trusts* (1881) 16 Ch D 270 which states that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal. In other words, where the respondent

wishes to raise matters which are unconnected with the substance of the appeal by the appellant the respondent must proceed by way of a separate notice of appeal.

[32] The principle enunciated in *Re Cavander's Trusts* has been widely referred with approval across the Commonwealth jurisdiction. In the New Zealand's case of *In re Parker (Deceased) Crow v Weston* [1948] NZLR 9 at pp 11–12 the Court of Appeal in Wellington held that:

> The cross-notices on appeal are accordingly out of time: R 6 of the Court of Appeal Rules; and see *Re Cavander's Trusts. Each could be good as a cross-appeal only with regard to a point already in issue in a validly-existing appeal.* The cross-notice on appeal is not of itself sufficient to set an appeal on foot, as it derives its validity from the appeal. All the parties were aware of the facts, and should have been on their guard; and they should have protected themselves by one of them giving formal notice, of appeal when a respondent has given notice and the appellant withdraws a validly-existing appeal, the respondent may elect to proceed with or to withdraw his notice: The *Beewing;* but here there is no validly-existing appeal If the cross notices were in time and held to be good even though the appeal was bad, and the appellant were still allowed to proceed on such cross-notices under R 6 (as to which there is no time-limit), this would render nugatory the whole purpose and effect of R 19. The notice under R 6 is only effective as to matter raised by the appeal itself, and *if any matter is to be raised by the respondent on appeal that is not in issue as a result of the appellant's notice of appeal: a substantive appeal must be lodged by such respondent.* (Emphasis added.)

[33] In the case of *Alati v Kruger* (1955) 94 CLR 216 the High Court of Australia applied the case of *Re Cavander's Trusts* and held that:

> It was not open to him to pursue either object by way of cross-appeal, for the appellant had no interest in the points involved: *Re Cavander's Trusts* [1881] 16 Ch D 270.

[34] In India, the case of *Re Cavander's Trusts* was applied with approval in the case of *Vadlamudi Venkateswarlu and anr v Ravipati Ramamma and anr* AIR 1950 Mad 379 wherein the High Court of Madras held that:

> [17] Dealing with a similar provision, namely, O 58 r 6 of the rules of the Supreme Court 1875, Jessel MR said in *Re Cavander's Trusts, (1881) 16 Ch D 270* (50 LJ ch 292), 'the terms of the latter part of this rule are very wide but looking at the former part it is evident that it was only intended to make the notice a substitute for a cross appeal and an appeal on a point which does not affect the original appellant cannot be a cross appeal. The notice may affect other parties also, and it so, it must be served upon them, but it cannot have been intended to enable a respondent to bring forward in this way a case with which the appellant has nothing to do.

[35] We noted in the present case that the High Court in its decision had made a finding that there was in existence a valid contract between the plaintiff

and the first defendant. The orders of the High Court that the first defendant pay damages in lieu of specific performance was the result of the principal finding that there was a binding contract between the plaintiff and the first defendant. As for the plaintiff, its appeal was only brought against a part of the decision of the High Court in ordering the first defendant to pay damages instead of granting specific performance.

[36] It would appear that none of the parties in this case appealed against the entire decision of the High Court. The first defendant had failed to appeal against the finding of the High Court that the HK MOU was a binding contract. The High Court's decision that there was a valid and binding agreement concluded between the plaintiff and the first defendant is adverse against the first defendant. It was thus incumbent on the first defendant to file a separate notice of appeal if it wanted the aforesaid decision to be reversed or set aside, rather than by filing a notice of cross-appeal. The operative words of 'to contend' and 'decision of the High Court should be varied' under r 8(1) of the RCA 1994 clearly limits the contentions under a notice of cross-appeal to effectively vary a decision, not set aside a judgment or order. It is incumbent on the first defendant to independently file a notice of appeal under r 5 of the RCA 1994 to rehear the issues that were not decided in the first defendant's favour. A notice of cross-appeal does not provide for a complaint to be re-heard. The first defendant is at liberty to file an independent appeal under s 67(1) of the CJA 1964.

CONCLUSION

[37] For the reasons above-stated we find that there is no merit in this appeal. The first defendant's appeal is therefore dismissed with costs.

Appeal dismissed with cost.

Reported by Kohila Nesan